Fermpro Sdn Bhd v Ketua Pengarah Jabatan Kastam Dan Eksais Diraja Malaysia

COURT OF APPEAL (PUTRAJAYA) — CIVIL APPEAL NO W-01(A)-464–09 OF 2023
RAVINTHRAN, HASHIM HAMZAH AND FAIZAH JAMALUDIN JJCA
24 DECEMBER 2024

Revenue Law — Duties and taxes — Whether Director-General of Customs ('DG') was right in raising bills of demand ('BODs') against appellant — Whether High Court erred in dismissing appellant's judicial review application to quash DG's decision to raise the BODs

The respondent had raised four bills of demand ('BODs') against the appellant ('Fermpro') under the Customs Act 1967, the Excise Act 1976, the Goods and Services Tax Act 2014 and the Sales Tax Act 2018 for payment of a total sum of RM7,784,249.72 as duties and taxes under those Acts in respect of the sale of ethanol by Fermpro to a company ('Molnlycke'). Pursuant to a sale and purchase agreement ('SPA'), Molnlycke had agreed to buy imported ethanol from Frempro on a 'DDU Buyer's Premises' (delivery duty unpaid at buyer's premises) basis. Fermpro then imported the ethanol from a company in Singapore ('Sasol Chemicals') and had the same stored in a free zone at Westport Free Zone, Port Klang, Selangor pursuant to a declaration in Free Zone Form No 1 Import ('Form ZB1') which named Sasol Chemicals as the 'Consignor/Exporter' and Fermpro as the 'Consignee/Importer'. In accordance with the SPA, Molnlycke had the ethanol removed from the free zone and transported to its licensed manufacturing warehouse ('LMW') in the principal customs area. Under s 7(1)(b) of the Free Zone Act 1990, goods brought out of a free zone and taken into any part of the principal customs area were deemed to be imported into Malaysia. The removal of the ethanol from the free zone was enabled by a Customs 'Form K1' in which Molnlycke was described as the 'Importer' and Fermpro as the 'Exporter'. In dismissing Fermpro's judicial review application to quash the respondent's decision to issue the BODs against Fermpro, the High Court held that Form K1 had wrongly declared Fermpro as 'Exporter' and Molnlycke as 'Importer' — that Fermpro should have been named as 'Importer' (as in Form ZB1), since it had imported the ethanol from Singapore into the free zone. In the instant appeal, Fermpro submitted that the High Court erred in finding that the declaration in Form K1 was wrong and that the error was sufficient reason for the respondent to raise the BODs. Secondly, it submitted, even if there was an error in Form K1, there was nothing in reg 28(1) of the Free Zones Regulations 1991 and s 57(a) of the Sales Tax Act 2018 that ousted the free tax status of goods that

were transported out of free zones to LMWs.

Held, unanimously allowing the appeal, setting aside the High Court's decision and quashing the BODs issued by the respondent against Fermpro:

(1) The High Court's decision that the declaration made in Form K1 was wrong (and that Fermpro should have been named as the 'Importer' in Form K1) and that the respondent could legally levy the duties and taxes on Fermpro for the removal of the ethanol from the free zone to Molnlycke's LMW by reason of the purported error in Form K1 were plainly wrong (see paras 86 & 64).

(2) In finding that Fermpro should have been named as 'Importer' in Form K1, the High Court judge failed to consider: (a) that the sale of the ethanol from Fermpro to Molnlycke involved a two-stage process of first exporting the ethanol from Singapore into the free zone and then exporting the ethanol from the free zone into Molnlycke's LMW in the principal customs area; (b) under s 7(1)(b) of the Free Zone Act 1990, goods brought out of a free zone and taken into any part of the principal customs area were deemed as imported into Malaysia; it therefore followed that Molnlycke was the importer of the ethanol into its LMW and not Fermpro; and (c) under the SPA, Molnlycke agreed to buy the ethanol on a 'DDU Buyer's Premise' basis, meaning Fermpro was responsible for all delivery costs of the ethanol to Molnlycke's premises but payment of all duties and taxes on the importation/purchase of the ethanol was Molnlycke's responsibility (see paras 48–50 & 57).

(3) Applying the purposive approach in interpreting reg 28(1) of the Free Zones Regulations 1981 and s 57(a)(ii) of the Sales Tax Act 2018 ('the STA 2018'), the said provisions provided for a free tax regime for goods transported or moved between free zones and other bonded/special areas in the principal customs area — they both did not require payment of import duties or taxes for the removal or transportation of goods from a free zone to an LMW and other bonded/special areas licensed under the Customs Act 1967 (see para 82).

(4) If Parliament had intended that errors in Form K1 shall give rise to taxes and duties for goods transported from a free zone to an LMW or any other bonded/special areas, it would have expressly provided for it in the relevant Acts or subsidiary legislations. For those reasons, any purported error in Form K1 did not oust the provisions of reg 28 of the Free Zone Regulations 1991 or s 57(a)(ii) of the STA 2018 to give rise to duties and/or tax for goods transported between special areas (see paras 83–84).

(5) The High Court judge plainly erred in holding that taxes and duties are due and payable on the ethanol moved from the free zone to Molnlycke's LMW because of a purported error in the Form K1, when no written law expressly stated so (see para 85).

[Bahasa Malaysia summary

Responden telah mengeluarkan empat bil tuntutan ('BOD') terhadap perayu ('Fermpro') di bawah Akta Kastam 1967, Akta Eksais 1976, Akta Cukai Barang dan Perkhidmatan 2014 dan Akta Cukai Jualan 2018 untuk pembayaran sejumlah RM7,784,249.72 sebagai duti dan cukai di bawah Akta tersebut berkenaan dengan penjualan etanol oleh Fermpro kepada sebuah syarikat ('Molnlycke'). Menurut perjanjian jual beli ('SPA'), Molnlycke telah bersetuju untuk membeli etanol yang diimport daripada Frempro atas 'DDU Buyer's Premises' (duti penghantaran tidak dibayar di premis pembeli). Fermpro kemudiannya mengimport etanol dari sebuah syarikat di Singapura ('Sasol Chemicals') dan menyimpannya di zon bebas di Westport Free Zone, Pelabuhan Klang, Selangor menurut deklarasi dalam Zon Bebas Borang No 1 Import ('Borang ZB1') yang menamakan Sasol Chemicals sebagai 'Konsainor/Pengeksport' dan Fermpro sebagai 'Penerima/Pengimport'. Selaras dengan SPA, Molnlycke telah mengeluarkan etanol dari zon bebas dan mengangkut ke gudang pembuatan berlesennya ('LMW') di kawasan kastam utama. Di bawah s 7(1)(b) Akta Zon Bebas 1990, barangan yang dibawa keluar dari zon bebas dan dibawa ke mana-mana bahagian kawasan utama kastam dianggap diimport ke Malaysia. Pengeluaran etanol dari zon bebas telah diluluskan oleh 'Borang K1' Kastam di mana Molnlycke dinyatakan sebagai 'Pengimport' dan Fermpro sebagai 'Pengeksport'. Dalam menolak permohonan semakan kehakiman Fermpro untuk membatalkan keputusan responden mengeluarkan BOD terhadap Fermpro, Mahkamah Tinggi memutuskan bahawa Borang K1 telah salah mengisytiharkan Fermpro sebagai 'Pengeksport' dan Molnlycke sebagai 'Pengimport' — bahawa Fermpro sepatutnya dinamakan sebagai 'Pengimport' (seperti dalam Borang ZB1), kerana ia telah mengimport etanol dari Singapura ke dalam zon bebas. Dalam rayuan semasa, Fermpro berhujah bahawa Mahkamah Tinggi terkhilaf apabila mendapati pengisytiharan dalam Borang K1 adalah salah dan kesilapan itu adalah alasan yang mencukupi untuk responden menaikkan BOD. Yang kedua, ia mengemukakan, walaupun terdapat kesilapan dalam Borang K1, tiada apa-apa dalam peraturan 28(1) Peraturan-Peraturan Zon Bebas 1991 dan s 57(a) Akta Cukai Jualan 2018 yang menghapuskan status cukai percuma barangan yang telah diangkut keluar dari zon bebas ke LMW.

Diputuskan, sebulat suara membenarkan rayuan, mengetepikan keputusan Mahkamah Tinggi dan membatalkan BOD yang dikeluarkan oleh responden terhadap Fermpro:

(1) Keputusan Mahkamah Tinggi bahawa deklarasi yang dibuat dalam

Borang K1 adalah salah (dan Fermpro sepatutnya dinamakan sebagai 'Pengimport' dalam Borang K1) dan bahawa responden boleh mengenakan duti dan cukai secara sah ke atas Fermpro untuk pengeluaran etanol dari zon bebas ke LMW Molnlycke oleh kerana kesilapan yang dikatakan dalam Borang K1 adalah jelas salah (lihat perenggan 86 & 64).

(2) Dalam memutuskan bahawa Fermpro sepatutnya dinamakan sebagai 'Pengimport' dalam Borang K1, hakim Mahkamah Tinggi gagal menimbangkan: (a) bahawa penjualan etanol daripada Fermpro kepada Molnlycke melibatkan proses dua peringkat pengeksportan etanol terlebih dahulu dari Singapura ke zon bebas dan kemudian mengeksport etanol dari zon bebas ke LMW Molnlycke di kawasan kastam utama; (b) di bawah s 7(1)(b) Akta Zon Bebas 1990, barang yang dibawa keluar dari zon bebas dan dibawa ke mana-mana bahagian kawasan utama kastam disifatkan sebagai diimport ke Malaysia; oleh itu, ia berikutan bahawa Molnlycke adalah pengimport etanol ke dalam LMWnya dan bukan Fermpro; dan (c) di bawah SPA, Molnlycke bersetuju untuk membeli etanol atas dasar 'DDU Buyer's Premise', bermakna Fermpro bertanggungjawab ke atas semua kos penghantaran etanol ke premis Molnlycke tetapi pembayaran semua duti dan cukai ke atas pengimportan/pembelian etanol adalah tanggungjawab Molnlycke (lihat perenggan 48–50 & 57).

(3) Menggunakan pendekatan bertujuan dalam mentafsir peraturan 28(1) Peraturan-Peraturan Zon Bebas 1981 dan s 57(a)(ii) Akta Cukai Jualan 2018 ('ACJ 2018'), peruntukan tersebut memperuntukkan rejim cukai percuma untuk barangan yang diangkut atau dipindahkan antara zon bebas dan kawasan berikat/khas lain di kawasan utama kastam — kedua-duanya tidak memerlukan pembayaran duti import atau cukai untuk pemindahan atau pengangkutan barang dari zon bebas ke LMW dan kawasan berikat/khas lain yang dilesenkan di bawah Akta Kastam 1967 (lihat perenggan 82).

(4) Jika Parlimen bercadang bahawa kesilapan dalam Borang K1 akan menimbulkan cukai dan duti bagi barangan yang diangkut dari zon bebas ke LMW atau mana-mana kawasan berikat/khas lain, ia akan memperuntukkannya dengan jelas dalam Akta atau perundangan kecil yang berkaitan. Atas sebab tersebut, sebarang kesilapan yang dikatakan dalam Borang K1 tidak membatalkan peruntukan peraturan 28 Peraturan-Peraturan Zon Bebas 1991 atau s 57(a)(ii) ACJ 2018 untuk menimbulkan duti dan/atau cukai bagi barangan yang diangkut antara kawasan khas (lihat perenggan 83–84).

(5) Hakim Mahkamah Tinggi secara jelas terkhilaf dalam memutuskan bahawa cukai dan duti perlu dibayar dan perlu dibayar ke atas etanol yang dipindahkan dari zon bebas ke LMW Molnlycke kerana kesilapan

yang dikatakan dalam Borang K1, apabila tiada undang-undang bertulis menyatakan dengan jelas sedemikian (lihat perenggan 85).]

Cases referred to

Comptroller-General of Inland Revenue, Malaysia v T [1970] 2 MLJ 35; [1969] 1 LNS 31, FC (refd)
Dream Property Sdn Bhd v Atlas Housing Sdn Bhd [2015] 2 MLJ 441; [2015] 2 CLJ 453; [2015] 2 AMR 601, FC (refd)
Gan Yook Chin (P) & Anor v Lee Ing Chin @ Lee Teck Seng & Ors [2005] 2 MLJ 1; [2004] 4 CLJ 309; [2004] 6 AMR 781, FC (refd)
Mangin v Inland Revenue Commissioner [1971] AC 739, PC (refd)
Ng Hoo Kui & Anor v Wendy Tan Lee Peng (administratrix for the estate of Tan Ewe Kwang, deceased) & Ors [2020] 12 MLJ 67; [2020] 10 CLJ 1, FC (refd)
Palm Oil Research and Development Board Malaysia & Anor v Premium Vegetable Oils Sdn Bhd & another appeal [2005] 3 MLJ 97; [2004] 4 AMR 202; ; [2004] 2 CLJ 265, FC (refd)
UEM Group Berhad (Dahulunya Dikenali Sebagai United Engineers (Malaysia) Berhad) v Genisys Integrated Engineers Pte Ltd & UEM Genisys Sdn Bhd and another appeal [2010] MLJU 2179; [2010] 9 CLJ 785; [2011] 1 AMCR 338, HC (refd)
WT Ramsay Ltd v Inland Revenue Commissioners [1982] AC 300, HL (refd)

Legislation referred to

Customs Act 1967 ss 2(1A), 17(1), 143(1), (5)
Excise Act 1976 s 15
Free Zones Act 1990 ss 4, 7(1)(b)
Free Zones Regulations 1991 reg 28, 28(1)
Goods and Services Tax Act 2014 ss 43, 162(a)
Interpretation Acts 1948 and 1967 s 17A
Sales Tax Act 2018 ss 2, 28, 28(1), 57(a), (a)(ii)

Appeal from: *Fermpro Sdn Bhd v Ketua Pengarah Jabatan Kastam dan Eksais DiRaja Malaysia* [2024] MLJU 1969 (High Court, Kuala Lumpur)

Subbramaniam Arjunan (Shanker, Arjunan & Chua) for the appellant.
Mohd Faisal bin Md Noor (with Liyana bt Muhammad Fuad) (Federal Counsel, Attorney General's Chambers) for the respondent.

Faizah Jamaludin JCA:

INTRODUCTION

[1] This an appeal by the appellant, Fermpro Sdn Bhd ('Fermpro') against the decision of the High Court dismissing its application by way of a judicial review for an order of certiorari to quash the decision of the Ketua Pengarah

Jabatan Kastam dan Eksais DiRaja Malaysia ('respondent') affirming four bills of demand ('BODs') raised by the respondent against Fermpro.

[2] The four BODs, all dated 15 June 2021, were raised by the respondent through the Pengarah Kastam Negeri, Perlis against Fermpro, under s 17(1) of the Customs Act 1967 (Act 235) ('the CA 1967'), s 15 of the Excise Act 1976 (Act 176) ('the EA 1976'), s 43 of the Goods and Services Tax Act 2014 (Act 762) ('the GST Act 2014') and s 28 of the Sales Tax Act 2018 (Act 806) ('the STA 2018'), in respect of the sale of ethanol by Fermpro to Molnlycke Health Care Sdn Bhd ('Molnlycke'). The four BODs read:

1. *Bil Tuntutan dibawah Akta Kastam 1967*

Dimaklumkan bahawa tuan *kurang membayar duti import* bagi tempoh bercukai dari Januari 2017 hingga Ogos 2019. *Hasil semakan dan auditan yang dilakukan ke atas rekod dan dokumen syarikat tuan mendapati terdapat kesalahan mengikrar Borang Kastam No 1 (K1)*. Dengan ini, mengikut Seksyen 17(1) Akta Kastam 1967, tuan adalah dituntut untuk *membuat bayaran duti import* seperti di Lampiran 1–1, Lampiran 1–2, Lampiran 1–2 & Lampiran 1–4 yang secara keseluruhan berjumlah *RM2,333,770.00*.

2. *Bil Tuntutan dibawah Akta Eksais 1976*

Dimaklumkan bahawa tuan *kurang membayar duti eksais* bagi tempoh bercukai dari Januari 2017 hingga Ogos 2019. Hasil semakan dan auditan yang dilakukan ke atas rekod dan dokumen syarikat tuan mendapati terdapat kesalahan mengikrar Borang Kastam No 1 (K1). Dengan ini, mengikut *Seksyen 15 Akta Eksais 1976*, tuan adalah dituntut untuk membuat *bayaran duti import* seperti di Lampiran 1–1, Lampiran 1–2, Lampiran 1–2 & Lampiran 1–4 yang secara keseluruhan berjumlah *RM4,460,377.67*.

3. *Bil Tuntutan dibawah Akta Cukai Barang dan Perkhidmatan 2014*

Dimaklumkan bahawa tuan *kurang membayar cukai barang dan perkhidmatan* bagi tempoh bercukai dari Januari 2017 hingga Ogos 2019. Hasil semakan dan auditan yang dilakukan ke atas rekod dan dokumen syarikat tuan mendapati terdapat kesalahan mengikrar Borang Kastam No 1 (K1). Dengan ini, mengikut Seksyen 43 Akta Cukai Barang dan Perkhidmatan 2014, tuan adalah dituntut untuk membuat bayaran duti import seperti di Lampiran 1–1, Lampiran 1–2, Lampiran 1–2 & Lampiran 1–4 yang secara keseluruhan berjumlah *RM167,417.63*.

4. *Bil Tuntutan dibawah Akta Cukai Jualan 2018*

Dimaklumkan bahawa tuan *kurang membayar cukai jualan* bagi tempoh bercukai dari Januari 2017 hingga Ogos 2019. Hasil semakan dan auditan yang dilakukan ke atas rekod dan dokumen syarikat tuan mendapati terdapat kesalahan mengikrar Borang Kastam No 1 (K1). Dengan ini, mengikut *Seksyen 28 Akta Cukai Jualan 2018*, tuan adalah dituntut untuk membuat bayaran duti import seperti di Lampiran 1–1, Lampiran 1–2, Lampiran 1–2 & Lampiran 1–4 yang secara keseluruhan berjumlah *RM822,684.42*. (Emphasis added.)

[3] Fermpro made an application to the respondent on 8 September 2020, under s 143(1) of the CA 1967, to review all four BODs.

[4] The respondent on 3 August 2021 issued a letter dated 29 July 2021, notifying Fermpro of its decision to maintain all four BODs against Fermpro.

[5] Dissatisfied with the respondent's decision of the review, Fermpro filed the application for judicial review at the High Court on 14 October 2021.

SALIENT FACTS AND THE APPLICABLE LAWS

[6] Fermpro carries on the business of manufacturing ethanol (aka Denatured Ethyl Alcohol ('DEA')). It also engages in importing ethanol from overseas and selling the same to customers in Malaysia. Molnlycke is one of its customers.

[7] The subject-matter of the impugned BODs, issued by the respondent against Fermpro, relates to the Fermpro's sale of ethanol to Molnlycke.

[8] Fermpro had entered into a sale and purchase agreement dated 14 November 2014 with Molnlycke for the sale and purchase of ethanol ('SPA') on a 'DDU Buyer's Premises' (delivery duty unpaid at buyer's premises) basis.

[9] For purposes of the SPA with Molnlycke, Fermpro imported ethanol from Sasol Chemicals Pacific Ltd, Singapore ('Sasol Chemicals') into Ancom-Chemquest Terminals Sdn Bhd's ('ACTSB') bulk terminal located in a free zone at Westport Free Zone, Port Klang, Selangor.

[10] The ethanol was imported into the free zone by a declaration in Free Zone Form No 1 Import ('Form ZB1'). In this present case, Form ZB1 in exh RLSC6 shows that Sasol Chemicals was named the 'Consignor/Exporter'; and Fermpro was named the 'Consignee/Importer'. The declaration in Form ZB1 was made on Fermpro's behalf by Tuck Sun & Co (M) Sdn Bhd ('TSC') — a delivery agent authorised by the respondent.

What is a free zone?

[11] A free zone is defined in the Free Zones Act 1990 (Act 438) ('the FZA 1990') as:

> any part of Malaysia declared under the provisions of subsection 3(1) to be a free commercial zone or a free industrial zone.

[12] Under s 2(1A) of the CA 1967, a free zone is deemed to be a place

outside Malaysia. Section 2(1A) reads:

> (1A) For the purposes of this Act (other than section 31), *a free zone is deemed to be a place outside Malaysia*. (Emphasis added.)

[13] With effect from 9 July 2019, s 2(1A) of the CA 1967 was amended by the Customs (Amendment) Act, 2019 (Act A1593), where a free zone was deemed to be a place outside a principal customs area:

> (1A) For the purposes of this Act, *a free zone shall be deemed to a place outside a principal customs area*, and the provisions of section 31 and Parts IV, V, V1 and VII of this Act shall apply to a free zone'.
>
> (1B) For the purposes of subsection (1A) —
>
> (a) 'free zone' means any area in Malaysia which has been declared by the Minister to be a free commercial zone or a free industrial zone under the Free Zone Act, 1990 (Act 438); and
>
> (b) 'principal customs area' means any part of Malaysia excluding free zone, Labuan, Langkawi, Tioman and Pangkor. (Emphasis added.)

[14] Pursuant to s 7(1)(b) of the FZA 1990, goods brought out of a free zone and taken into any part of the principal customs area are deemed imported into Malaysia. Section 7(1)(b) reads:

> (b) goods which are brought out of a free zone and taken into any part of the principal customs area shall be deemed to be imported into Malaysia.

[15] Accordingly, notwithstanding the amendment to s 2(1A) of the CA 1967, the situation after 9 July 2019 remains the same as regards goods brought out of the free zone. Pursuant to s 7(1)(b) of the FZA 1990, goods brought out of the free zone into any part of the principal customs area are deemed an import into Malaysia.

[16] Under the terms of the SPA, Molnlycke is contractually required to remove the ethanol, imported by Fermpro and deposited at the ACTSB terminal at the Westport Free Zone, within five months from the date of delivery of the ethanol into the free zone. In accordance with the terms of the SPA, Molnlycke removed the ethanol from the free zone to Molnlycke's LMW, which located in the principal customs area.

[17] Goods are removed from a free zone to a principal customs area through Borang Kastam No 1 ('Form K1'). The information to be filled in the boxes of the Form K1 include 'Consignor/Exporter' and 'Consignee/Importer'.

[18] The 'K1 Chits' produced during the hearing before the High Court showed that in relation to the ethanol removed from the free zone to Molnlycke's LMW, Molnlycke was declared as the 'importer', and Fermpro as the 'exporter'.

JUDGMENT OF THE HIGH COURT JUDGE

[19] The learned High Court judge held that Fermpro should have been named as an 'importer' instead of an 'exporter' on Form K1 for the ethanol removed by Molnlycke from the free zone to its LMW. He said this was because Fermpro was named as an 'importer' in Form ZB1 when it imported the ethanol from Singapore into the free zone.

[20] His Lordship found that it was an error that Fermpro was declared in Form K1 as an 'exporter' and Molnlycke as an 'importer: He held that for this reason, it was lawful for the respondent to have raised the customs duties and taxes in the four BODs against Fermpro.

[21] The learned High Court judge further held that the respondent had imposed the customs duties and taxes on Fermpro because of the incorrect declaration in Form K1 of the ethanol sold by Fermpro to Molnlycke and not because of the removal of the ethanol by Molnlycke (referred to in the judgment as 'DEA') from the free zone to its LMW. The learned judge stated in para [27] of his grounds of judgment:

> [27] ... There is no evidence that the Director General imposed customs duties or tax for the transportation of the DEA from the free zone to an LMW. The customs duties and tax were imposed on the basis of the incorrect declaration made in Customs Form K1 where the DEA was sold to Molnlycke.

[22] By reason of his findings that: (a) the declaration of Fermpro as 'exporter' and Molnlycke as 'importer' on Form K1 was erroneous; and (b) the respondent had imposed the duties and taxes on Fermpro because of the error in Form K1, the learned judge dismissed Fermpro's application.

FERMPRO'S SUBMISSION

[23] Counsel for Fermpro submitted that the learned High Court judge had erred in fact and in law on two counts, namely:

(a) when he made the finding that there was an error in Form K1, where Fermpro was named as 'exporter' and Molnlycke was named as 'importer', and that Fermpro should have been named in Form K1 as 'importer' instead; and

(b) even if there was an error in Form K1, there is no provision in reg 28(1)

of the Free Zones Regulations 1991 and s 57(a) of the STA 2018 to oust the free tax status of goods moved or transported from free zones to LMWs.

THE RESPONDENT'S SUBMISSION

[24] At the substantive hearing of the judicial review before the High Court, the learned Federal Counsel ('FC'), raised a preliminary issue that Fermpro did not exhaust the statutory appeal procedure in s 143(5) of the CA 1967 as it did not appeal the respondent's decision to the Customs Appeal Tribunal under s 143(5) before filing its application for judicial review.

[25] The learned High Court judge did not dismiss Fermpro's application by reason of the preliminary issue. Also, he did not address the preliminary issue in his written grounds of judgment of 14 April 2024. His judgment dealt only with the merits of the application.

[26] At the hearing of this appeal, the learned senior federal counsel ('SFC') repeated the preliminary issue, raised by the FC at the substantive hearing, before submitting on the merits of the appeal.

[27] As regards the learned judge's decision and written judgment, the learned SFC submitted that the learned judge was not plainly wrong in deciding that the declaration of Fermpro as 'exporter' in Form K1 was erroneous and that the respondent's decision, to issue the BODs and to affirm the BODs because of the error, were not tainted with illegality, irrationality, or procedural impropriety.

THE PRELIMINARY ISSUE

[28] The 'preliminary issue' was raised by the learned FC for the first time at the substantive hearing of the judicial review at the High Court. She did not raise it at the leave stage of Fermpro's application.

[29] The leave hearing of Fermpro's application for judicial review was held on an opposed ex parte basis on 6 December 2021 at the High Court. The same learned FC, who represented the respondent at the substantive hearing, had represented the Attorney-General at the hearing of the leave application. The records show that at the hearing of the leave application, the learned FC did not raise the 'preliminary issue'. Instead, she informed the court that she did not object Fermpro's leave application for judicial review; she only objected Fermpro's application for a stay of execution of the BODs pending disposal of the judicial review by the High Court.

[30] After hearing the submission from Fermpro's counsel and the non-objection by the learned FC, the High Court allowed Fermpro's leave application for judicial review on 6 December 2021. The learned judge directed the stay application be fixed for hearing on an inter partes basis. The inter partes hearing of the stay application was heard on 15 June 2022, where the High Court granted Fermpro's application for stay pending disposal of the substantive hearing of the judicial review.

[31] Although the learned High Court judge did not touch upon the 'preliminary issue' in his judgment, the learned SFC repeated the 'preliminary issue' at the hearing of this appeal.

[32] With respect to the learned SFC, this 'preliminary issue' should have been raised by the FC at the hearing of the leave application. However, instead of opposing the leave application and raising the 'preliminary issue', the learned FC informed the High Court that she had no objection to Fermpro's application for leave.

[33] Perhaps this was a reason why the learned High Court judge did not address the 'preliminary issue' in his judgment delivered at the conclusion of the substantive hearing of the judicial review.

[34] In the circumstances, we too shall not deal with the 'preliminary issue' in this appeal.

ISSUES FOR DETERMINATION

[35] The issues for this court's determination arising out of the High Court's judgment in this case are whether the learned High Court judge had erred in fact and in law: (a) by finding that Fermpro should have been named as the 'importer' in Form K1 in respect the ethanol removed from the free zone to Molnlycke's LMW; and (b) by reason of the purported error in the Form K1, the respondent can oust the free tax status in the reg 28(1) of the Free Zones Regulations 1991 and s 57(a) of the STA 2018.

PRINCIPLES OF APPELLATE INTERVENTION

[36] The law is settled that an appellate court ought not to intervene with the trial court's conclusion on primary facts unless it is satisfied the trial judge was plainly wrong. Based on this 'plainly wrong test', an appellate court is entitled to examine the process of evaluation of evidence by the trial court and may set aside any decision of the trial court with no or insufficient judicial appreciation of the evidence or based on errors of law: see the Federal Court decisions in *Gan Yook Chin (P) & Anor v Lee Ing Chin @ Lee Teck Seng & Ors*

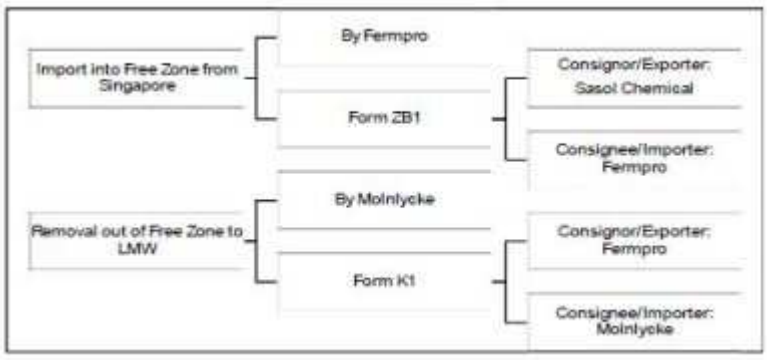
[2005] 2 MLJ 1; [2004] 4 CLJ 309; [2004] 6 AMR 781; *UEM Group Berhad (Dahulunya Dikenali Sebagai United Engineers (Malaysia) Berhad) v Genisys Integrated Engineers Pte Ltd & UEM Genisys Sdn Bhd and another appeal* [2010] MLJU 2179; [2010] 9 CLJ 785; [2011] 1 AMCR 338; *Dream Property Sdn Bhd v Atlas Housing Sdn Bhd* [2015] 2 MLJ 441; [2015] 2 CLJ 453; [2015] 2 AMR 601; *Ng Hoo Kui & Anor v Wendy Tan Lee Peng (administratrix for the estate of Tan Ewe Kwang, deceased) & Ors* [2020] 12 MLJ 67; [2020] 10 CLJ 1.

[37] Therefore, in deciding whether this court should intervene in the decision made by the learned High Court judge in dismissing Fermpro's application in the judicial review, this court has to ascertain whether the learned judge was plainly wrong based on the facts and the applicable law in this case.

ISSUE 1: WAS THERE AN ERROR ON FORM K1? SHOULD FERMPRO BE NAMED AS 'IMPORTER' IN FORM K1 FOR THE ETHANOL REMOVED FROM THE FREE ZONE TO THE LMW?

[38] With regards to the ethanol sold by Fermpro to Molnlycke, the documents exhibited during the judicial review hearing at the High Court show the ethanol imported by Fermpro from Sasol Chemicals, Singapore was deposited via pipeline at the ACTSB at the Westport Free Zone, Port Klang as per Form ZB1 dated 30 September 2018. The ethanol was removed by Molnlycke from the free zone to its LMW per Form K1 dated 29 October 2018.

[39] Based on the terms of the SPA, there are two stages in the movement of the ethanol sold by Fermpro to Molnlycke under the SPA: (a) the importation of ethanol from Singapore by Fermpro into the free zone; and (b) the removal of the ethanol by Molnlycke from the free zone to its LMW located in the principal customs area. See diagram below:



[40] Fermpro had imported the ethanol from Singapore into the free zone. The information required to be filled in Form ZB1 for importation of goods into a free zone are, among others, 'Consignor/Exporter' and 'Consignee/Importer'. The consignor and exporter of the ethanol was Sasol Chemical, and the consignee and importer of the ethanol of the ethanol into the free zone was Fermpro. Accordingly, Sasol Chemical was named 'Consignor/Exporter' and Fermpro was named as 'Consignee/Importer' in Form ZB1.

[41] Pursuant to the SPA between Fermpro and Molnlycke, Molnlycke had, through transport agents authorised by the respondent, removed the ethanol out of the free zone into its LMW within the period stipulated in the SPA.

[42] As discussed above, pursuant to s 7(1)(b) of the FZA 1990, goods that are brought out of a free zone and taken into any part of the principal customs area are deemed to be imported into Malaysia. Accordingly, the ethanol removed from the free zone into Molynlycke's LMW was deemed to be imported into Malaysia.

[43] It follows therefore, that Molnlycke as the party who was importing the ethanol from the free zone into its LMW in the principal customs area was named as the 'Consignee/Importer' in Form K1, and that Fermpro was named the 'Consignor/Exporter' in Form K1.

[44] However, the learned High Court judge found that because Fermpro was named as the 'Consignee/Importer' in Form ZB1, it should also be named as 'Consignee/Importer' in Form K1. He held that not only was the Fermpro being declared as the 'Consignor/Exporter' of the ethanol moved out of the free zone in the Form K1 erroneous but also false. His Lordship in his grounds of judgment said:

[24] ... In other words, *the declaration in Form K1 as Molnlycke being the importer*

A *and the applicant being the exporter was not correct or false*. Thus, the Director General did not commit any error of law the kind of which would warrant interference by way of judicial review ...

[25] The applicant's case was fallacious. It depended heavily on Form K1, where the applicant was described as exporter and Molnlycke, its LMW customer, was described as the importer. *The description of the applicant and Molnlycke was clearly wrong and gave rise to customs duties implications as found by the Director General. The description was against the evidence in Form ZB1 which declared the applicant as an importer* ... The applicant's whole case hinges on the Form K1 wherein the declaration of the description of the parties was not true.

...

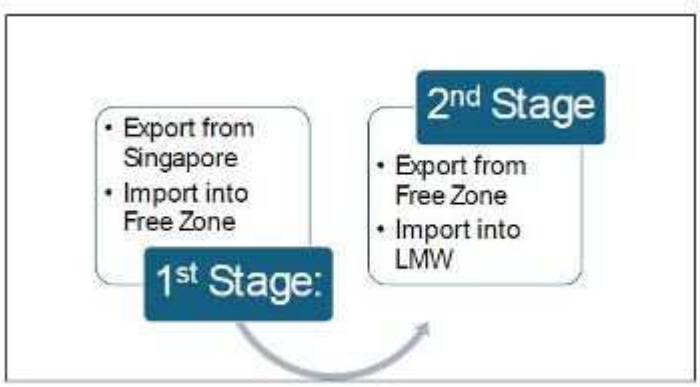
[41] There is no new reason. The reason held all along was that Form K1 was not correct. *The importer in Form K1 ought to be the applicant and not the exporter of the DEA that was deposited at the free zone based on undisputed evidence in the affidavits and submissions. Molnlycke was the purchaser of the DEA and not the importer*. The undisputed evidence showed that Molnlycke was the customer of the applicant and holder of an LMW licence to whom the DEA was sold. The word false with respect to Form K1 is not a new reason. The word false depicts the incorrect declaration made in Form K1 ... (Emphasis added.)

[45] Inexplicably, the learned High Court judge, in holding that Fermpro should have been named in the Form K1 as the 'Consignee/Importer' of the ethanol removed out of the free zone to the LMW, did not address who should be the 'Consignor/Exporter' of the ethanol in Form K1. For there to be a consignee/importer of goods into the principal customs area, there must be a consignor/exporter of the goods out of the free zone. Just as for every giver, there must be a receiver.

[46] If Fermpro must be named as the 'Consignee/Importer' as held by the learned High Court judge, does it mean that Molnlycke should be named as the 'Consignor/Exporter' of the ethanol in Form K1? Indeed, this cannot be the case since Molnlycke is neither the consignor nor the exporter of the ethanol removed from the free zone. As the purchaser of the ethanol in the SPA, Molnlycke is the consignee of the ethanol purchased and delivered to its LMW.

[47] Additionally, following through with the learned High Court judge's reasoning to its conclusion, ie the parties in Form K1 should be the same as the parties in Form ZB1, Sasol Chemical should thus be named as the 'Consignor/Exporter' of the ethanol from the free zone to Molnlycke's LMW. However, it would be plainly wrong to name Sasol Chemical as the 'Consignor/Exporter' of the ethanol removed from the free zone in Form K1 since Sasol Chemical was not a party in the SPA for the sale and purchase of the ethanol between Fermpro and Molnlycke, neither was it the consignor or exporter of the ethanol removed from the free zone to the LMW.

[48] We find that in making his finding that Fermpro should have been named as an importer on Form K1, the learned judge, first, failed to take into account that in the sale of the ethanol from Fermpro to Molnlycke there were two stages of the import and export of the ethanol: first stage: the export of the ethanol from Singapore into the free zone at Westport Free Zone; and second stage, the export of the ethanol from the free zone into Molnlycke's LMW in the principal customs area. Both stages of the export and import are shown in the diagram below:



[49] Secondly, the learned judge failed to consider that under s 7(1)(b) of the FZA 1990, goods brought out of a free zone and taken into any part of the principal customs area are deemed imported into Malaysia from the free zone. It follows therefore, that Molnlycke was the importer of the ethanol into its LMW and not Fermpro.

[50] Thirdly, we find that the learned judge failed to consider the terms and conditions of the SPA between Fermpro and Molnlycke. In his judgment, he did not address the fact that the sale and purchase of the ethanol was on a 'DDU Buyer's premise' basis. He did not take into account that under the terms of the SPA, Fermpro agreed to sell to and Molnlycke agreed to buy ethanol from Fermpro on 'a DDU Buyer's premises' basis.

[51] The learned High Court judge repeated in his judgment the respondent's audit findings that the ethanol was declared in Form K1 by transport companies TSC or Mobisco Sdn Bhd, ('MSB') and that the ethanol was delivered to Molnlycke's LMW by transport companies Chan Soon Transport & Trading Sdn Bhd ('CSTTSB') or Cogent Transport Company Sdn Bhd ('CST') — which transportation costs were paid by Fermpro.

[52] TSC or MSB paid the import GST payable on the declaration in Form K1 for the importation of the goods into the LMW from the free zone, for which they subsequently claimed reimbursement from Fermpro. Fermpro reimbursed both TSC and MSB for the import GST paid and claimed the import GST as Fermpro's tax input since Fermpro was responsible under the SPA for the transportation costs of the ethanol right up to delivery of the ethanol to Molnlycke's LMW.

[53] The recital and salient terms of the SPA are as follows. Fermpro is referred to as 'Seller' and Molnlycke as 'Buyer' in the SPA.

WHEREAS:

a) *Seller is a major ethanol supplier engaged in the importation, storage, transportation, and sale of ethanol and wishes to sell ethanol to Buyer on the terms and conditions set forth in this Agreement*; and

b) *Buyer is consumer of ethanol and wishes to buy ethanol from Seller on the terms and conditions set forth in this Agreement*.

NOW THEREFORE in consideration of the foregoing premises and mutual covenant and agreements hereinafter set forth Seller and Buyer hereby agree as follows:

1. QUANTITY

Buyer warrants to Seller that shall purchase from Seller at least 1,000 metric tons (mt) of ethanol for each year during the terms of this Agreement. Such quantity shall be spread out evenly throughout each year on the basis of at least 500mt for every 5-month period. *Buyer agrees to purchase the ethanol from Seller on a DDU Buyer's Premises basis* and subject to a quantity of not less than 90mt in any month. *DDU shall be as defined in INCOTERMS 2000 and amendment or modification thereof.*

Relying on Buyer's warranty as stated above, Seller shall import by ship a parcel of about 500mt of ethanol (hereinafter referred to as 'Said Parcel'), duty unpaid, at least once every five months (or more frequently as required by Buyer) and *shall upon ship's arrival, discharge and store such Said Parcel in a bonded tank at Seller's leased storage facilities in Ancom-Chemquest Terminals, Port Klang (hereinafter referred to as 'Seller's Premises*'). Thereafter, subject to Buyer fulfilling its obligations as stated in Clause 3, *Seller shall proceed to deliver such Said Parcel to Buyer's Premises using bulk road tanker.*

Buyer agrees that it shall take delivery of the entire quantity of such Said Parcel within five months of the date of arrival and discharge of such said Parcel into Seller's Premises. In the event that Buyer fails to do so, Seller shall have the right, at the expiry of the 5-month period, to dispose off any balance quantity of such Said Parcel in any manner Seller sees fit and Buyer shall be liable to Seller for any and all costs, charges, expenses (including any duties and taxes) incurred by Seller and any and all losses and damages suffered by Seller arising out of or in connection with such disposal.

...

3. IMPORT LICENSES, DUTIES, TAXES AND OTHER CHARGES

Buyer shall be responsible in obtaining any and all licenses or permits and paying any duties, taxes, fees charges or similar assessments that may be required by the government or any agency thereof in connection with the importations and or purchase of the ethanol from the Seller ... (Emphasis added.)

[54] Clause 1 of the SPA expressly states that the sale of the ethanol from Fermpro to Molnlycke is a on a 'DDU Buyer's Premises' basis and that 'DDU shall be defined in INCOTERMS 2000 and any amendment or modification thereof'.

What are INCOTERMS 2000?

[55] INCOTERMS 2000 is a set of international rules, published by the International Chamber of Commerce (ICC) effective 1 January 2000, for the interpretation of the most commonly used trade terms. It divides transaction costs and responsibilities between buyer and seller, and closely corresponds to the UN Convention of Contracts for the International Sale of Goods ('the CISG'). The editors of *Goode on Commercial Law* (5th Ed) — Professor Roy Goode's classic text on commercial law — said the following with regards to INCOTERMS:

32.09 The primary source of the rights and duties of the parties to a contact of sale is, of course, the contract itself. This encompasses not only the express terms spelled out in the contract document but usages of trade and any codification of trade terms incorporated into the contract and thereby adopted by the parties as their contractual dictionary. The most widely adopted of these as Incoterms, published by the International Chamber of Commerce.

[56] 'DDU' is defined in the INCOTERMS 2000 as:

Delivered Duty Unpaid (DDU)

It means that the seller pays for all transportation costs and bears all risk until the goods have been delivered, but does not pay for the duty.

[57] In the SPA between Fermpro and Molnlycke, the sale and purchase of the ethanol is on a 'DDU Buyer's Premises' basis. It means that the ethanol is to be delivered to the buyer's premises (ie Molnlycke's LMW) and Fermpro is responsible for all the transportation costs and bears all the risk of the ethanol until it is delivered to Molnlycke's LMW but Fermpro is not responsible for paying any duties, if required, on the ethanol purchased. The responsibility to pay any duties and taxes on the ethanol is Molnlycke's: cl 3 of the SPA states that Molnlycke is responsible for paying any duties or taxes in connection with the importation and/or purchase of the ethanol from Fermpro.

[58] Relying on Molnlycke's warranty that it will purchase 1,000mt of ethanol from Fermpro annually, the latter agreed to import that 500mt of ethanol every five months and to deposit the same in ACTSB's terminal in the Westport Free Zone.

[59] Molnlycke is contractually obliged under the SPA to take delivery and remove the entire quantity of ethanol from the free zone to its LMW within five months from the date the ethanol was deposited in the free zone. If Molnlycke fails to take delivery and remove the ethanol within five month period, Fermpro has the right, under cl 1 of the SPA, to dispose any balance quantity of ethanol stored in the free zone and Molnlycke shall be liable to Fermpro for all costs, charges and expenses (including duties and taxes) incurred by Fermpro and all losses and damages suffered by Fermpro in connection with the disposal.

[60] In his judgment, the learned High Court judge held that Fermpro was the importer and owner of the ethanol by reason of the respondent's audit findings that there were no records of business transactions between the transport companies (TSC, MSB, CSTTSB and CST) with Molnlycke, and because of these business transactions and Fermpro's payments to these transport companies. Based on these findings, the learned judge held that the respondent's decision in his letter of 19 August 2019 was not tainted with illegality, or irrationality, or procedural impropriety. He said:

> [22] The audit also made inspections at TSC, MSB, CSTTSB, and PCSB and found no records of business transactions between these companies and Molnlycke. All the business transactions and payments received by these companies were from the applicants.
>
> [23] In the circumstances, the Director General did not commit any errors of law as alleged by the applicant. The applicant was the importer and owner of the DEA and not Molnlycke. Molnlycke was the purchaser of the DEA and purchased the same from the applicant [Fermpro]. Thus, I found no illegality or irrationality, or procedural impropriety in making the following decision in the Director General's letter dated 19 August 2019:
>
> > Fermpro Sdn Bhd tidak layak menuntut pengecualian duti import, duti eksais import, cukai barang dan perkhidmatan (CBP) impoty dan cukai jualan (CJ)(import) bagi *denatured ethyl alcohol/ethanol* yang di bawa keluar dari Ancom-Chemquest Terminals Sdn Bhd (ACTSB). Ini adalah disebabkan barang yang dikeluarkan dan diikrar atas nama Molnlycke Health Care Sdn Bhd dalam Borang Kastam No. 1 (*which is Form K1*) adalah sepatutnya milikan Fermpro Sdn Bhd setelah menelity semua dokumen-dokumen berkaitan.

[61] With respect to the learned judge, Fermpro is contractually obliged under the SPA to pay for all the transportation costs and to bear all the risk until the ethanol removed by Molnlycke from the free zone is delivered to

Molnlycke's LMW. It follows therefore, that all the business transactions between the transport companies would be between Fermpro and the transport companies and not with the customer, Molnlycke. There would be no reason for there to be records of business transactions between any of the transport companies and Molnlycke. Just like where a person buys goods from a seller, eg directly from the seller, or on shopping platforms such as Shopee or Amazon, the seller bears the delivery costs; thus, the business transaction to deliver the goods purchased would be between the seller and the delivery companies, eg DHL, Gedex or Lalamove. It would not be between the buyer and the delivery companies. It follows, therefore, there would be no records of business transactions between the buyer and the delivery companies.

[62] Therefore, we find nothing sinister for the ethanol to have been transported out of the free zone to the buyer's premises (ie Molnlycke's LMW) by transport companies paid for by the seller (ie Fermpro). It was in accordance with the terms of SPA between the parties, where the sale and purchase of the ethanol was on a 'DDU Buyer's Premises' basis.

[63] Accordingly, we find that the learned judge was plainly wrong to hold that Fermpro should have been named as the importer on Form K1 because the respondent did not find any records of business transactions between the transport companies and Molnlycke and because Fermpro had paid for the transportation costs of the ethanol removed from the free zone to Molnlycke's LMW.

[64] Accordingly, for the reasons above, we find that the learned High Court judge was plainly wrong in holding that Fermpro should have been named as the importer of the ethanol in Form K1 for the ethanol removed from the free zone into Molnlycke's LMW. We further find that the learned judge was plainly wrong in holding that Form K1 was erroneous and the information declared therein, false.

ISSUE 2: BY REASON OF THE PURPORTED 'ERROR' IN FORM K1, CAN THE FREE TAX STATUS IN THE REG 28(1) OF THE FREE ZONES REGULATIONS 1991 AND S 57(a) OF THE STA 2018 BE OUSTED?

[65] Under s 4 of the FZA 1990 any goods, except those prohibited by law, may be brought into a free zone free of customs or excise duties. Section 4 of the FZA 1990 reads:

> 4 Goods in a free zone
>
> Subject to this Act goods of any description, except those specifically and absolutely prohibited by law, may be brought into, produced or manufactured in a free zone

A without payment of any customs duty or excise duty.

[66] Section 162(a) of the GST Act 2014 provides:

(a) no tax is due and payable for goods imported into a free zone, except for goods
B imported to be used or consumed in the free zone, other than goods for the purpose of commercial or retail trade activities approved under the FZA 1990;

[67] Section 57(a) of the STA 2018 allows for the free movement of goods between special areas, which includes free zones and LMWs. It stipulates that
C no sales tax shall be levied and payable on any taxable goods imported into or transported to or from these special areas. Sections 2 and 57(a) of the STA 2018 read:

Section 2: Interpretation

D 'special areas' means any free zone, licensed warehouse and licensed manufacturing warehouse, and the Joint Development Area;

Section 57: Sales tax relating to taxable goods imported into or transported to or from special areas

E *Notwithstanding anything to the contrary contained in this Act —*

(a) *no sales tax shall be levied and payable on any taxable goods —*

(i) imported into the special areas or transported to the special areas from Malaysia;

F (ii) *transported between the special areas*; or

(iii) transported from the special areas to the designated areas,

other than any taxable goods which the Minister may from time to time declare by order published in the *Gazette*; (Emphasis added.)

G

[68] In this present case, the learned High Court judge held that based on his findings that the declarations in Form K1 were erroneous, the respondent's decision to affirm the BODs for the duties and taxes raised against Fermpro
H under the CA 1967, the EA 1976, the GST Act 2014 and the STA 2018 was not illegal, irrational or tainted with procedural impropriety. He held:

[24] Therefore, the import duty, excise duty, GST, and sales tax from September 2016 to August 2019 was lawfully raised under s 17 of the Customs Act, s 15 of the Excise Act, s 46 of the GST, and s 28 of the Sales Tax Act respectively.

I

[69] Learned counsel for Fermpro disagrees. He said that even if there was an error in Form K1, the respondent does not have the power to oust the free tax status statutorily accorded to goods removed from the free zone to an LMW

under reg 28(1) of the Free Zones Regulations 1991 and s 57(a) of the STA 2018.

[70] The removal of goods from a free zone to an LMW is governed by reg 28 of the Free Zones Regulations 1991. For the period in question for which the BODs were issued (ie January 2017–August 2019), reg 28 of the Free Zone Regulations 1991 reads:

> *28 Removal of goods from licensed warehouse etc to free zones and vice versa*
>
> A person or his agent who removes goods —
>
> (a) from —
>
> (i) a licensed warehouse;
>
> (ii) a licensed manufacturing warehouse; or
>
> (iii) icensed inland clearance depot,
>
> (b) licensed under the CA 1967 to a free zone through a principal custom area;
>
> (c) *from a free zone* —
>
> (i)) to a duty free shop;
>
> (ii) to a licensed warehouse;
>
> (iii) *to a licensed manufacturing warehouse*; or
>
> (iv) licensed inland clearance depot,
>
> (d) licensed under the CA 1967 through a principal customs area;
>
> (e) from a free zone to another free zone through a principal customs area; or
>
> (f) from any place of import to any free zone through a principal customs area,
>
> (g) shall, personally or through his agent, submit a declaration as in Form Customs No 8 as specified in the Second Schedule of the Customs Regulations 1977 to a proper officer of customs at the free zone or at the customs office designated for that purpose.
>
> (2) A copy of the declaration submitted pursuant to this regulation shall be transmitted to the Authority in charge of the free zone by the proper officer of customs.

[71] By reason of the purported error in Form K1, the respondent had raised, for the period of January 2017 to August 2019, the BODs for customs duties and taxes against Fermpro:

[72] The learned High Court judge held that the respondent's action in imposing the customs duties and taxes for the removal of the ethanol from the

free zone to Molnlycke's LMW was not illegal because, in his view, reg 28(1) of the Free Zones Regulations 1991 does not apply to the facts of the case. He held:

> [27] Regulations 28(1) of the Free Zones Regulations does not apply to the facts of the instant case. There is no evidence that the Director General imposed customs duties or tax for the transportation of the DEA from the free zone to an LMW. The customs duties and tax were imposed on the basis of the incorrect declaration made in Customs Form K1 where the DEA was sold to Molnlycke.
>
> [28] The reliance of reg 28(1) of the Free Zones Regulations is clearly misplaced.

[73] While the learned judge accepted that no sales tax was payable on any goods moved between a free zone and an LMW under s 57(a)(ii) of the STA 2018, he went on to hold that the sales tax imposed by the respondent for the removal of the ethanol from the free zone to Molnlycke's LMW was to recover sales tax under s 28 of the STA 2018 and had 'nothing to do' with s 57(a)(ii) of the STA 2018. He said:

> [30] For the purposes of the Sales Tax Act 'special area', inter alia, means any free zone, any licensed warehouse (LW), and any licensed manufacturing warehouse (LMW). So clearly, no sales tax shall be levied and payable on any taxable goods transported between a free zone and an LMW.
>
> [32] In view of the clear and unambiguous words of s 28 of the Sales Tax Act, the sales tax imposed in the bill of demand has nothing to do with s 57(a)(ii) of the Sales Tax Act. This submission is devoid of merit.

[74] Section 28 of the STA 2018 governs the recovery of sales tax as a civil debt. It states:

> 28 Recovery of sales tax, etc, as civil debt
>
> (1) Without prejudice to any other remedy and notwithstanding any review or appeal against any decision of the Director General under section 96, *any sales tax due and payable, any surcharge accruing, or any penalty, fee or other money payable, under this Act, may be recovered as a civil debt due to the Government*.
>
> (2) *Where an invoice shows a sale of taxable goods as having taken place with sales tax chargeable on the goods*, there shall be recoverable from the person who issued the invoice an amount equals to —
>
> (a) that which is shown in the invoice as sales tax; or
>
> (b) so much of the total amount shown as payable as is to be taken as representing sales tax, if the sales tax is not separately shown in the invoice,
>
> (3) for the sale of such taxable goods. (Emphasis added.)

[75] Respectfully, we disagree with the learned High Court judge's view that the recovery of sales tax by the respondent under s 28 of the STA 2018 has 'nothing to do' with s 57(a)(ii) of the STA 2018.

[76] Section 28(1) of the STA 2018 states that the respondent may recover as a civil debt 'any sales tax due and payable'. In this present case, s 57(a)(ii), read with s 2 of the STA 2018, expressly states that no sales tax shall be levied and payable on taxable goods transported between a free zone and an LMW. It follows, therefore, as no sales tax is due and payable for the ethanol transported from the free zone to Molnlycke's LMW, such non-payable sales tax is not recoverable under s 28 of the STA 2018.

[77] Thus, we find that respondent's action in raising a BOD for the recovery of sale tax under s 28 of the STA 2018 is tainted with illegality, since such sale tax cannot be levied and is not payable pursuant to s 57(a)(ii) of the STA 2018.

[78] Moreover, it is a fundamental principle of law that taxes or duties cannot be imposed on a subject without clear words in any written law, and taxing statutes must be construed in accordance with this principle. In *Comptroller-General of Inland Revenue, Malaysia v T* [1970] 2 MLJ 35; [1969] 1 LNS 31, Gill FJ said:

> In the absence of a clear intention that tax should be imposed, the respondent is not liable to payment for the sum granted for the abrogation of his contract. *It is an important canon in the construction of revenue Acts that the subject is not to be taxed unless there are clear words in the Act imposing such a tax*. (Emphasis added.)

[79] The courts, in determining those 'clear words', are to use the purposive approach in interpreting a taxing statute — just as in any other statute. Lord Wilberforce enunciated this principle in *WT Ramsay Ltd v Inland Revenue Commissioners* [1982] AC 300, where he said:

> ... I think it opportune to restate some familiar principles and some of the leading decisions so as to show the position we are now in.
>
> (1) *A subject is only to be taxed upon clear words, not upon 'intendment' or upon the 'equity' of an Act. Any taxing Act of Parliament is to be construed in accordance with this principle*. What are 'clear words' is to be ascertained upon normal principles: these do not confine the courts to literal interpretation. *There may, indeed should, be considered the context and scheme of the relevant Act as a whole, and its purpose may, indeed should, be regarded*: ... (Emphasis added.)

[80] The Federal Court in *Palm Oil Research and Development Board Malaysia & Anor v Premium Vegetable Oils Sdn Bhd & another appeal* [2005] 3 MLJ 97; [2004] 4 AMR 202; [2004] 2 CLJ 265 held the principle enunciated

by Lord Wilberforce in *WT Ramsay Ltd* applies in consonance with s 17A of the Interpretation Acts 1948 and 1967 ('the Interpretation Acts') in interpreting taxing statutes. It further held that the principles set out in the advice of the Privy Council delivered by Lord Donovan in *Mangin v Inland Revenue Commissioner* [1971] AC 739 (the '*Donovan* principles') is the correct approach to be adopted by a court when interpreting a taxing statue. Gopal Sri Ram JCA (as he then was), sitting on the Federal Court panel in *Palm Oil Research and Development Board Malaysia*, summarised the *Donavan* principles as follows:

> First, the words are to be given their ordinary meaning. They are not to be given some other meaning simply because their object is to frustrate legitimate tax avoidance devices ...
>
> Secondly, '... one has to look merely at what is clearly said. There is no room for any intendment. There is no equity about a tax. There is no presumption so to a tax. Nothing is to be read in, nothing is to be implied. One can only look fairly at the language used'. ...
>
> Thirdly, the object of the construction of a statute being to ascertain the will of the legislature, it may be presumed that neither injustice nor absurdity was intended. If therefore a literal interpretation would produce such a result, and the language admits of an interpretation which would avoid it, then such an interpretation may be adopted.
>
> Fourthly, the history of an enactment and the reasons which led to its being passed may be used as an aid to its construction.

[81] His Lordship held that s 17A of the Interpretation Acts has no impact upon the well-established guidelines applied by courts when interpreting a taxing statute, and that s 17A and the guidelines in the *Donovan* principles 'co-exist harmoniously for they operate in entirely different spheres when aiding a court in the exercise of its interpretive jurisdiction' — that it fits into the third principle of the *Donovan* principles, which is to avoid an interpretation that produces injustice or absurdity.

[82] Applying the purposive approach in interpreting reg 28(1) of the Free Zones Regulations 1981 and s 57(a)(ii) of the STA 2018, we find that the said provisions provide for a free tax regime for goods transported or moved between free zones and other bonded/special areas in the principal customs area — they both do not require the payment of import duties or taxes for the removal or transportation of goods from a free zone to an LMW and other bonded/special areas licensed under the CA 1967.

[83] More importantly, if Parliament had intended that errors in Form K1 shall give rise to taxes and duties for goods transported from a free zone to an LMW or any other bonded/special areas, it would have expressly provided for

it in the relevant Acts or subsidiary legislations.

[84] For these reasons, we agree with learned counsel for Fermpro that any purported error in Form K1 does not oust the provisions in reg 28 of the Free Zone Regulations 1991 or s 57(a)(ii) of the STA 2018 to give rise to duties and/or tax for goods transported between special areas.

[85] Hence, we find that it was plainly wrong for the learned High Court judge to have held that taxes and duties are due and payable on the ethanol moved from the free zone to Molnlycke's LMW because of a purported error in Form K1, when no written law expressly states so.

DECISION

[86] Accordingly, we find that the learned judge's decision that there was error in the declaration made in Form K1, and that the respondent can legally levy the duties and taxes for the removal of the ethanol from the free zone to Molnlycke's LMW by reason of the purported error in the Form K1 were plainly wrong.

[87] We, therefore, allow Fermpro's appeal against the High Court's order of 25 August 2023. The said High Court order is set aside.

[88] An order of certiorari is hereby granted to quash: (a) the bills of demand, all dated 15 June 2021, issued by the respondent through the Pengarah Kastam Negeri, Perlis; and (b) the respondent's decision dated 3 August 2021 affirming the said bills of demand.

[89] Costs in the sum of RM10,000 to be paid by the respondent to Fermpro.

Appeal allowed; High Court's decision set aside; the BODs against Fermpro quashed.

Reported by Ashok Kumar